BEN-MAR CONSTRUCTION

Employer

and Case 4-RC-21392

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 595

Petitioner

HEARING OFFICER'S REPORT ON OBJECTION TO ELECTION

Dated: August 28, 2008

DEVIN S. GROSH, Hearing Officer: Pursuant to a Notice of Hearing on Objection to Election issued by the Regional Director for Region 4 on June 26, 2008, I conducted a hearing on this matter on July 15, 2008 in Philadelphia, Pennsylvania. Based on the evidence submitted in that hearing, including the testimony of the witnesses and my assessment of their credibility, as well as the post-hearing briefs of the parties, I make the following findings and conclusions.

The issue presented in this case arose from a representation election conducted on March 20, 2008, in accordance with a stipulated election agreement in a unit of building laborers employed by the Employer in the State of New Jersey.[1]

The Employer is a masonry contractor. The May 20, 2008 election was conducted from 7:00 a.m. to 7:30 a.m. in the storage building next to offices on the Employer's 366 Old White Horse Pike, Waterford Works, New Jersey property. Petitioner received six votes, nine voters voted against representation, and two voters were challenged as ineligible. Approximately 18 employees were eligible to vote in the election. The challenged ballots are not determinative of the results of the election. As set forth in the Notice of Hearing, Petitioner timely filed Objections and Amended Objections to the election on March 27, 2007. On June 17, 2008, Petitioner withdrew Amended Objections Two and Three leaving Objection One remaining. As shown below, I overrule Petitioner's remaining Objection.

THE OBJECTION

Petitioner filed the following objection:

[1] The unit description: All full-time and regular part time building laborers employed by the Employer in the State of New Jersey, excluding all other employees including masons, clericals, confidential employees, guards and supervisors as defined in the Act.

> Within twenty-four (24) hours of the election, the Employer conducted a captive audience meeting in violation of the *Peerless Plywood* rule.[2]

FACTS[3]

In support of the Objection, Petitioner presented Ben-Mar employees Danny Hunt and William Rome,[4] and Laborers' Union Representative Gurvis Minor. The Employer presented Ben-Mar owner Tim Aglialore, and Ben-Mar employees Ed and William Gould.

From approximately 6:00 a.m. to 7:00 a.m. on March 20, 2008, prior to the 7:00 a.m. start of the election, Ben-Mar employees and voters arrived at the Employer's property. The Employer's property includes an office building, storage building, and a parking lot. The election was held in the storage building located approximately 50 feet from the office building. The office building consists of two floors including a reception area, meeting room and bathroom on the first floor, and an office on the second floor. On March 20, 2008, at 6:15 a.m., Employer owner Tim Aglialore opened the office building.[5] Aglialore, who had purchased coffee and doughnuts for employees on his way to work that morning, placed the coffee and doughnuts in the meeting room. Aglialore does not routinely purchase coffee and donuts for employees. Employee Ed Gould also purchased coffee and doughnuts and he, too, placed them in the meeting room. From 6:15 a.m. to 7:00 a.m. Ben-Mar employees had doughnuts and coffee in the meeting room. This was not a pre-arranged meeting and the Employer did not require employees to attend or report to the office building that morning. Ben-Mar employees do not routinely report to Employer's property but report to their specific construction work site. On March 20, 2008, the employees were scheduled to begin work at 7:00 a.m. At approximately 6:30 a.m., the Board Agent conducting the election arrived and immediately met with Aglialore and Laborers' Union Representative Gurvis Minor in the storage building for a pre-election meeting. At, or a few minutes before 7:00 a.m. Aglialore left the meeting with the Board Agent in the storage building and walked to the office building. At 7:00 a.m. Aglialore announced to employees in the meeting room,

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[2] The Notice of Hearing on Objection to Election stated on page 1, "In support of its remaining Objection 1, the Petitioner submitted evidence that on March 20, 2008, Employer owner Tim Aglialore provided coffee and doughnuts to employees and spoke to employees assembled in his office for approximately 15 minutes shortly before the polls opened."

[3] I have reviewed and weighed all testimony in light of the entire record. The facts found in this report are based on the entire record as well as my observation of the witnesses. Testimony not specifically mentioned has not been disregarded but has been rejected as not credible, or not relevant to the objection.

[4] Hunt and Rome are both no longer employed by Ben-Mar.

[5] I credit Aglialore that he opened the buildings at his property at 6:15 a.m. and explain this credibility determination in further detail below.

"The polls are open" and left the area without engaging in any other conversations with employees.[6]

DISCUSSION

Petitioner has the burden of proving that the conduct to which it has objected had the tendency to interfere with the employees' freedom of choice. *Double J Services*, 347 NLRB No. 58, slip op. at 1-2 (2006). As shown below, I find that Petitioner has not met its burden in this case.

The Board in *Peerless Plywood*, 107 NLRB 427, 429 (1953), announced a rule forbidding employee captive-audience election speeches within the 24 hour period prior to an election. In *Business Aviation*, 202 NLRB 1025 (1973), the Board stated, "That rule was not intended to nor, in our opinion, does it prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election." In *Electro Wire Products*, 242 NLRB 960 (1979), the Board overruled an objection citing an employer president who individually spoke to each employee on the day of the election and asked them to vote no. See also e.g., *Andel Jewelry Corp.,* 326 NLRB 507 (1998); and *Associated Milk Producers*, 237 NLRB 879 (1978). I therefore find that Petitioner has not met its burden of establishing that a captive-audience meeting occurred at any time during the morning hours of March 20, 2008, and that no objectionable conduct occurred within the meaning of the *Peerless Plywood* rule.

I further find that the Employer did not engage in objectionable conduct by providing coffee and doughnuts to employees prior to the start of the election. To determine whether a pre-election grant of benefits improperly influenced the outcome of an election, the Board examines a number of factors, including: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees would view the purpose of the benefit; and (4) the timing of the benefit. *B&D Plastics*, 302 NLRB 245 (1991). The Board has held that "campaign parties, absent special circumstances, are legitimate campaign devices" and that it will not set aside an election simply because a union or employer provided free food and drink to employees. *Chicagoland Television News*, 328 NLRB 367 (1999); and *L.M. Berry & Co*., 266 NLRB 47, 51 (1983). I do not characterize the Employer's coffee and doughnuts in a meeting room as a "campaign party" and this case does not present any special circumstances that necessitate a finding of objectionable conduct. The Employer, at most, provided a benefit of nominal value as a courtesy to its employees who, because of the election, reported to and gathered at its offices rather than reporting to their worksites. That was the only connection the refreshments had to the election. The Employer made no promises, did not campaign and its owner was only fleetingly present in the room with the employees who choose to gather there. In *Chicagoland Television News*, the Board, citing *B&D Plastics*, found that an employer party 12 hours before an election was not objectionable. Off duty employees received free alcoholic and non-alcoholic beverages, food and entertainment. *Chicagoland Television News,* 328 NLRB at 367, 368. In addition, in *Joe's Plastics*, 287 NLRB 210 (1987), the Board

[6] I credit Aglialore and explain my credibility determination below.

found an Employer's provision of coffee and doughnuts during a safety meeting "too minimal a benefit to interfere with, restrain, or coerce the employees in the selection of their representative." Id. at 210. The same result is warranted here.

Although the Notice of Hearing specifically stated that Petitioner submitted evidence that Aglialore held a meeting with employees 15 minutes prior to the election, Petitioner presented no evidence that Aglialore held a meeting during that 15-minute period on March 20, 2008. I credit Aglialore that he arrived at the property at 6:15 a.m. and never conducted a meeting that morning. Aglialore was direct and straightforward about the timing of events while Petitioner witnesses' testimony regarding the timing of events they claimed took place were inconsistent with the times of the pre-election meeting and the polling times. William Rome testified that, at 6:08 a.m. to 6:09 a.m., while standing in the hallway, outside the meeting room, he heard Aglialore say, "We got this. We got this meeting, and anybody voting yes, you're pretty much finished, so I urge you not to vote yes." Rome's testimony is not credible. Rome's recollection of events did not flow naturally. Petitioner witness Danny Hunt and Employer witness William Gould[7] contradict Rome. They testified that they were present in the meeting room and neither of them heard Aglialore make the above statement as Rome contends. Hunt and Gould also do not place Aglialore in the meeting room at that time. Based on the above, I find that Aglialore did not speak to employees in the meeting room from 6:08 to 6:09 as Rome contends and he did not make the statement Rome attributed to him.

Employee Danny Hunt testified that he arrived at the Employer's property at 6:00 a.m., entered the meeting room and "proceeded to talk to the guys about better benefits, money and stuff like that." Hunt then testified that a Ben-Mar supervisor named Rudy[8] said to him, "Shut up, they'll be no union talk." The Petitioner presented no evidence to show that Bennett is a Section 2(11) supervisor or Section 2(13) agent of the Employer. To establish Bennett's supervisory status, Petitioner, in its brief, relies on Aglialore's testimony that he considers Bennett a supervisor. That evidence, while sufficient to establish what Aglialore believes, falls woefully short of establishing that Bennett enjoys the statutory indicia of supervisory status set forth in Section 2(11) of the Act. *Williamette Industries*, 336 NLRB 743 (2001). Accordingly, I find the Petitioner failed to establish that Bennett is a statutory supervisor or agent of the Employer. Inasmuch as Hunt was the only individual who testified that Bennett made this statement, and because I find that Hunt is not an altogether reliable or credible witness, I find that Bennett did not make the statement Hunt attributes to him. Moreover, Petitioner did not file an objection concerning Bennett's conduct.

Laborers' Representative Gurvis Minor testified that, after the pre-election meeting, Aglialore walked into the office building at 6:25 a.m. and spoke to employees for 10 or 15 minutes. Eight employees then walked out of the office building toward the supply building while Aglialore stood in the door way and spoke to each employee who left. Minor couldn't hear the conversations. Minor's testimony was vague and

[7] William Gould's nickname at Ben-Mar is Collard Greens.

[8] Aglialore testified that Rudy is a foreman named Rudolph Bennett.

unpersuasive. I credit the testimony of Aglialore that he left the supply building and informed employees in the meeting room that the polls were open at 7:00 a.m. and did not engage in a conversation with the employees in the meeting room or near the door. I also credit Employer witnesses William and Ed Gould, who testified that they did not have conversations with Aglialore after Aglialore informed them that the polls were open. In addition, Minor didn't hear what Aglialore allegedly said to employees in the office building or as they exited. Accordingly, even if I were to rely on Minor's testimony, his testimony does not form the basis for finding that Aglialore engaged in any objectionable conduct. As stated above, the Board in *Business Aviation* stated that the *Peerless Plywood* rule "was not intended to nor, in our opinion, does it prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election." *Business Aviation*, supra, 202 NLRB at 1025.

For the forgoing reasons, I find Petitioner has not proven that the Employer engaged in any conduct that had a reasonable tendency to interfere with employee free choice. I therefore recommend that the Objection be overruled.

CONCLUSION and RECOMMENDED ORDER

In accordance with the above findings, I recommend that the Objection be overruled and that an appropriate certification be issued based on the tally.

Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations and the Notice of Hearing on Objection to Election, within 14 days from the date of issuance of this Report, either party may file with the Board in Washington, D.C., an original and 8 copies of exceptions hereto by mail or by electronic filing through the Agency's Web site at www.nlrb.gov. Immediately upon the filing of such exceptions, the party filing them shall serve a copy thereof on the other party, and shall file a copy with the Regional Director either by mail or by electronic filing through the Agency's Web site. If no exceptions are filed hereto, the Board will adopt the recommendations of the Hearing Officer.

Signed at Philadelphia, Pennsylvania this 28th day of August, 2008.

Devin S. Grosh, Hearing Officer
National Labor Relations Board
Fourth Region
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